Rogers Corporation *and* Jeremiah Lamothe. Case 34–CA–9117

April 12, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 26, 2001, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief.

The Board has considered the decision and the record in light of the exceptions and briefs and affirms the judge's rulings, findings,[1] and conclusions, amends the remedy, and adopts the recommended Order as modified and set forth in full below.[2]

As part of his proposed remedy, the judge recommended that interest on the backpay owed to discriminatee Jeremiah Lamothe be calculated on a daily compounded basis. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Commercial Erectors, Inc.*, 342 NLRB No. 94, slip op. at 1 fn.1 (2004); *Accurate Wire Harness*, 335 NLRB 1096 fn.1 (2001).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Rogers Corporation, Rogers, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to grant, or consider granting, job openings to, discharging, or otherwise taking adverse action against any employee for reasonably and honestly invoking any actual or reasonably perceived right they have under the collective-bargaining agreement with Oak Lodge-Rogers Local No. 46 and United Paperworkers International Union, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jeremiah Lamothe full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Within 14 days from the date of this Order, offer Lamothe instatement to the second shift job he sought through the contractual bidding procedure in October 1999 or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(c) Make Lamothe whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in Rogers and Woodstock, Connecticut copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order and notice to more closely reflect the violations found. We shall also modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). Further, we shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed either of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1999.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. April 12, 2005

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to grant, or refuse to consider granting job openings, discharge or otherwise take adverse action against any of you for reasonably and honestly invoking any actual or reasonably perceived rights you have under our collective-bargaining agreement with Oak Lodge-Rogers Local No. 46 and United Paperworkers International Union, AFL–CIO.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in the exercise of your rights guaranteed in Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jeremiah Lamothe full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer Jeremiah Lamothe instatement to the second shift job he sought through the contractual bidding procedure in October 1999 or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Jeremiah Lamothe whole for any loss of earnings and other benefits resulting from the discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Lamothe's unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ROGERS CORPORATION

Rick Concepcion, Esq. and *Robert M. Cook, Esq.*, for the General Counsel.

Peter A. Janus, Esq. (Siegel, O'Connor, Schiff & Zangari, P.C.), for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Hartford, Connecticut, on October 2 and 3, 2000. Jeremiah Lamothe, an individual, filed the charge on January 6, 2000, and amended it on April 26, 2000. The complaint, which issued on April 27, 2000, and was amended at the hearing, alleges that Rogers Corporation (the Respondent), violated Section 8(a)(1) of the Act by refusing to grant, or consider granting, a permanent position to Lamothe and by terminating him on October 25, 1999.[1] Specifically, the complaint alleges that the Respondent terminated Lamothe because he exercised his right under a collective-bargaining agreement to bid on a permanent position. The Respondent, in its answer to the complaint filed May 10, 2000 and amended at the hearing, admits that it rejected Lamothe's bid for a permanent position and terminated him, but denies that it did so for unlawful reasons.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the closing argument made at the hearing by the General Counsel and the

[1] All dates are in 1999 unless otherwise indicated.

briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures specialty composite materials at its facilities in Rogers and Woodstock, Connecticut. The Respondent annually purchases and receives at its Connecticut facilities goods valued in excess of $50,000 directly from points outside the State of Connecticut. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits further, and I find, that Oak Lodge-Rogers Local Number 46 and the United Paperworkers International Union, AFL–CIO, now known as PACE International Union, AFL–CIO, and referred to here as the Union, is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Evidence

As noted above, the complaint alleges that the Respondent terminated Lamothe because he exercised a contractual right to bid on a permanent position. The General Counsel relies on the *Interboro*[2] and *City Disposal*[3] line of cases holding that an employee engages in protected concerted activity under Section 7 of the Act when he invokes a right contained in a collective-bargaining agreement. An employer who takes adverse action against an employee for exercising this right violates Section 8(a)(1) of the Act. The Respondent contends that Lamothe, as a temporary employee, had no right to bid on a permanent job under the collective-bargaining agreement. In addition, the Respondent contends that it did not fire Lamothe because he bid on a permanent job, but rather because he misled the Employer by misrepresenting his interest in the temporary job he was hired to fill.

The Respondent has two manufacturing facilities in Connecticut, the composite materials division located in Rogers and the poron materials division located in Woodstock. The Respondent's main office is located in the Rogers plant. The Union has represented the production and maintenance employees at both plants for many years. The current collective-bargaining agreement is effective for the period October 1, 1996 to October 1, 2001. There are about 60 unit employees at the Rogers plant and about 70 unit employees at the Woodstock plant. David Richardson is the division manager of the Composite Materials Division. His office is at the Rogers plant where he spends essentially all of his time. Harry Kenworthy is the division manager of the Poron Division, with his office located at the Woodstock plant. Al Lyon is the Human Resources manager for both divisions, with an office at each plant. Lyon spends about half his time at each plant. The Respondent admits that Lyon is a supervisor and agent of the Respondent within the meaning of the Act.[4]

For a number of years, the Respondent has had a summer employment program through which college students are hired to perform bargaining unit work at the Respondent's plants. These students work either in maintenance jobs, such as painting or cleaning, or fill in for absent and vacationing unit employees. Under the terms of the parties' collective-bargaining agreement, the hiring of such temporary employees is limited to 60 days, absent an agreement between the parties to extend the time. A May 17, 1999 e-mail from Lyon to Richardson which is in evidence sets forth the terms negotiated by the parties for the 1999 summer employee program. The Union's president, Stewart Rivers, acknowledged that this document accurately set forth the terms of the agreement. The 1999 agreement provides that:

> 1. Individual hires will not exceed 60 calendar days of employment unless the Union and Company mutually agree.
>
> 2. Individuals hired will be college students in the current hiring year, and will not be eligible for continuing employment beyond this summer program.
>
> 3. Individuals hired will be assigned as needed, and will not be eligible to bid on any posted openings which may occur. No special treatment will be granted for these positions when filling shutdown openings.
>
> 4. In hiring otherwise eligible individuals, preference will be given to daughters and sons of Rogers employees.
>
> 5. The company will collect initiation fee and dues as prescribed by contract.

According to Lyon, this agreement essentially codified the terms of the summer program as it had existed in past years.

Lamothe began working for the Respondent in June 1997 as a summer employee under this program. He was rehired to work in the summers of 1998 and 1999. Each year, he completed a job application on which he checked "summer" for the type of employment desired. He spent all three summers working at the Respondent's Woodstock plant under Maintenance Supervisor John Neal. The first time he was hired, Lamothe signed a dues check-off authorization and paid an initiation fee. He was given a copy of the collective-bargaining agreement. Lamothe paid union dues throughout his three summers of employment. When he returned for the second and third summers, he was only required to pay $1 as an initiation fee instead of the $25 initiation fee required of new employees. There is no dispute that Lamothe was considered a good employee during his participation in the summer program. The one written evaluation he received, in 1997, rates him as excellent in most categories.

In 1999, the parties agreed to extend the summer program beyond 60 days. Lamothe worked until August 29. Toward the

[2] *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967).

[3] *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984).

[4] Although the complaint did not specifically allege that Richardson was a supervisor or agent of the Respondent, there does not appear to be any dispute that he was. In any event, because the evidence in the record establishes that he has the authority to hire and fire employees, I find that Richardson was the Respondent's supervisor and agent within the meaning of the Act during the period relevant to these proceedings.

end of his employment, Lamothe began inquiring of his supervisor about obtaining full-time permanent employment with the Respondent. His supervisor suggested he speak to Rivers, the union president. Lamothe spoke to Rivers during his last week of work. He asked Rivers what his chances were of getting a position on second or third shift at either plant. According to Lamothe, Rivers told him his chances were good because he had a good record and a good reputation. Rivers told Lamothe that he didn't know if any positions were open, but said he would make a few phone calls to see what he could do. Lamothe testified that Rivers also suggested he check to see if there were any postings on the bulletin board. Lamothe testified that he did this but the postings on the board were outdated. He also testified that he wasn't sure he could bid on such postings because of the language in the summer employment program referred to above.

Rivers, who testified as a witness for the General Counsel, corroborated Lamothe's testimony in this regard. According to Rivers, Lamothe approached him about a permanent job on second shift that he heard was opening up in the Rogers plant. Although Rivers believed this conversation occurred soon after Lamothe finished his summer job, he was not certain of the date. Rivers testified that Lamothe asked if he would speak to someone at the company on his behalf. Rivers, having worked with Lamothe at the Woodstock plant the three previous summers, agreed to do this. Rivers testified further that, within a day or so of his conversation with Lamothe, he telephoned Richardson to tell him about Lamothe's interest in permanent employment. Rivers told Richardson that he knew Lamothe was a good worker from having worked with him and suggested that Richardson also speak to Lamothe's supervisor in Woodstock, John Neal. According to Rivers, Richardson said he would take it under consideration.

Richardson, a witness for the Respondent, acknowledged having a conversation with Rivers which he recalled as occurring around the beginning of September. According to Richardson, Rivers told him there was a young guy who had worked in Woodstock for three summers and had a good record. Rivers told Richardson he could check this out with Neal. Rivers told Richardson that Lamothe was now back in school and was looking for a job. Rivers asked Richardson if he could find something for him and said that he would vouch for him. Richardson did not testify as to his response.

According to Lamothe, in the week following his conversation with Rivers, he received a call from Lyon. Lyon told Lamothe that he heard that Lamothe was interested in a position with the company. When Lamothe confirmed that he was, Lyon asked him if he wanted to come down to the plant to fill out an application. Lamothe said yes. That same day, Lamothe went to the Rogers plant and filled out an application. According to Lamothe, Lyon handed him the blank application, he filled it out and returned it to Lyon. The application, which is in evidence, is dated September 1. On this application, Lamothe checked off "full-time" for type of employment desired. He did not check either "temporary" or "part-time," although those options appear on the application form. After he gave Lyons his application, Lyons asked him whether he would be able to work full-time and go to school. Lamothe testified that he told Lyon that would not be a problem. Lyon told him there were no open jobs at the time. He then asked Lamothe if he would be interested in a temporary position if there were no permanent positions. Lamothe told Lyon he would be interested, but he asked Lyon if he could bid on a permanent job if one opened up. According to Lamothe, Lyon replied that, as far as he knew, Lamothe would have all the rights of a regular employee, but whether he got the job would depend on his seniority. Lamothe also told Lyon that he was interested in either second or third shift, but would prefer second. Lyon denied that such a meeting ever occurred. His testimony will be discussed later in this decision.

Lamothe then had an interview with two supervisors, Mark Hilton and another whose name he could not recall at the hearing. He did recognize Rene Hebert, who was at the hearing as a witness for the Respondent, as the other supervisor who interviewed him. According to Lamothe, this interview lasted about 10–15 minutes and the main concern of Hilton and Hebert was Lamothe's ability to work full-time and go to school. Lamothe told them he had scheduled his classes in such a way that he could work full-time and overtime without any conflict. Lamothe testified that there was no discussion of any specific job during this interview. After his interview with the two supervisors, Lamothe was taken back to Lyon's office. Lyon told him that he would contact Lamothe if something came up. He also told Lamothe that he could check in with Lyon periodically to see if anything had come up. Lamothe then left the plant. As will be discussed further, infra, Hilton and Hebert acknowledge interviewing Lamothe but recall the interview occurring about a month later and contradict Lamothe regarding what occurred after the interview.

Lamothe testified that, after his interview, he called Lyon about 1–2 times a week to see if anything had come up. He did not always speak to Lyon when he called. He recalled actually speaking to Lyon at least two times during the month of September. On one occasion, Lamothe stopped by Lyon's office while in the vicinity of the Rogers plant on another matter. Lamothe could not recall when this occurred. Lyon was not in, but he ran into Richardson in the hallway by Lyon's office. Richardson introduced himself and asked if he could help Lamothe with anything. Lamothe identified himself and explained why he was there. Richardson, who appeared to Lamothe to be aware of his interest in employment, told Lamothe that they were still discussing it, but that there might be a temporary position opening up. Lamothe told Richardson he would be interested in such a position.

Richardson admitted meeting Lamothe at the plant under circumstances similar to those described by Lamothe. Richardson testified that this occurred about 3 weeks after his conversation with Lyon. According to Richardson, he did not know who Lamothe was when he first encountered him in the hallway. When he asked Lamothe if he could help him, Lamothe identified himself and said he was looking for Al Lyon. Richardson admits he recognized Lamothe's name as the young man that Rivers had called him about. Richardson testified that Lamothe told him he was interested in a job and that he was going to school. Richardson told him that there might be something coming up in a few weeks that would last 4–6 weeks, maybe

more. Richardson testified that Lamothe said he would be interested in that because it would fit into his schedule. According to Richardson, Lamothe told him his classes were all in the morning this term because he had pushed some classes off until the next semester. He told Richardson that the job Richardson described would allow him to work and earn some extra money for Christmas and the next semester. Richardson told Lamothe that he would let Lyon know. Richardson testified that there was no discussion, one way or another, about permanent employment. Richardson testified that he did tell Lyon about his conversation with Lamothe and suggested that he consider Lamothe for one of the temporary openings that were under consideration at the time.

Lamothe testified further that Lyons called him on October 14 and told him that the Respondent did have a temporary position on second shift. Lyon told Lamothe the job was for 60 days. He asked Lamothe if he was interested. Lamothe said he was. Lyon then offered him the job and Lamothe accepted. Lyon told him to report on Monday, October 18 at 2:30 p.m. so he could fill out paperwork before the shift started at 3 p.m. When Lamothe reported to work on October 18, he met with Donna St. Jean, Richardson's secretary and the Human Resources assistant at the Rogers plant. St. Jean gave Lamothe the same forms to fill out that he had been given during his previous summer employment, including the dues check-off authorization. St. Jean filled out a "New Hire & Rehire Form" for Lamothe on October 21 indicating that he was a rehire and describing his job title as "unassigned." In the box for regular or temporary employee, she indicated he was a regular employee. According to Richardson, this means that he was eligible for all the benefits of a regular unit employee such as insurance. Richardson testified that the "temporary" category on the form is used only for salaried employees hired through temporary agencies.

The job Lamothe was hired for was to operate one of two pieces of machinery normally operated by one job classification. He was paid at the Labor Grade 4 rate. He was to receive 2 weeks training on the job. On his second day on the job, Lamothe saw a job posting for a permanent position on second shift at the Woodstock plant. The job was at a lower labor grade than the temporary position he was on. The posting contains language encouraging "all interested employees, men and women, to bid on open positions." Lamothe testified that he asked the employees who were training him whether he could bid on the job and if they thought he had a chance of getting it. Lamothe did not know the names of theses employees, but acknowledged that they were unit employees. These employees told him he had as much right as anyone to bid on the job. That same day, October 19, he submitted his job bid. The job bid card was punched in at 9:21 on October 19. Lamothe testified that he continued with his training on the temporary position the remainder of the first week. On Friday, Lamothe's supervisor, Norman Briquier, approached him while he was at his machine and told Lamothe that he knew he had bid on the job. He told Lamothe that supervisors are informed when production workers bid on a job. Briquier asked Lamothe if he was really interested in the other job. Lamothe told him he had always been interested in a permanent position. Briquier wished him luck and walked away. Briquier, who testified for the Respondent, admitted learning that Lamothe had bid on a permanent job that Friday but denied having any conversation with Lamothe about the bid.

The following Monday, when he reported to work, Briquier told him that Lyon wanted to see him in his office. Briquier then escorted him to Lyon's office and left. Lyon opened the meeting by saying that there were rumors going around that Lamothe was interested in a permanent position. Lamothe replied that he had already told Lyon when he first interviewed that he was interested in permanent employment. Lyon denied remembering such a conversation. Lyon then told Lamothe that management was not happy that he bid on a job after the Respondent trained him on a temporary job. Lamothe offered to withdraw the bid, but Lyon said that management would not go along with that. Lyon told Lamothe he had to let him go. On cross-examination, Lamothe acknowledged that Lyon also accused Lamothe of not being "forthcoming" about his interest in a permanent position and that he had "misled" the company. Lamothe also agreed that Lyon told him he was being fired because the Respondent did not want to waste any more time training him for the temporary position since he was interested in a permanent position. After this meeting, Lamothe gathered his belongings and left the plant.

The next day, Lamothe went to the union hall and met with Rivers. Rivers suggested Lamothe file a grievance. The grievance was filed October 26. Because it involved a termination, it was pushed to third step. Lamothe attended the third step meeting on October 27 with Rivers. Richardson represented the Respondent. Lyon was also present. The testimony of Rivers and Richardson about this meeting is mutually corroborative. When Rivers asked why Lamothe was discharged, Richardson said it was because he had shown an interest in a permanent position. Rivers asked Richardson to repeat this, which he did. Lamothe also recalled that Rivers told Richardson during the meeting that Lamothe had offered to withdraw the bid. Lamothe did not recall any response. Richardson corroborated Lamothe that Rivers made such a statement at the meeting. At the end of the meeting, Richardson said this was not a grievable matter because Lamothe was a probationary employee. Lamothe also attended the fourth step meeting at which Dennis McCarthy, from the Respondent's Corporate Human Resources Department, represented the Respondent. According to Lamothe, McCarthy took the same position, i.e., that the termination was not unjust, and that it was not grievable because he was a probationary employee.

Lamothe also filed for unemployment benefits, which he was awarded after the unemployment claims examiner found that he was discharged for reasons other than misconduct. The Respondent did not appear at Lamothe's unemployment hearing, choosing to file a written response. In the written response, dated November 2, Lyon wrote that the reason Lamothe was discharged was because he "indicated he no longer wanted the temporary position for which hired." In response to a question why the Respondent considered his actions "deliberate," Lyon wrote: "omission of this information caused training to occurr [sic] that was wasted time and expense."

Lyon has been the Respondent's Human Resources manager since March 1998. As noted above, he denied meeting with or interviewing Lamothe on September 1. According to Lyon, his involvement in the hiring of Lamothe began with Richardson telling him about Lamothe. Although he did not initially testify as to when this conversation occurred, he recalled on cross-examination that it was in late September. Lyon testified that Richardson said at that time that there might be temporary jobs created "down the road aways" and that Lamothe would be interested in such a job. Lyon testified that this was the first time Richardson spoke to him about Lamothe. Lyon did not immediately contact Lamothe after his conversation with Richardson. He first contacted Lamothe, also in late September, after the decision was made to create the temporary position on the saturent line on second shift. According to Lyon, he called Lamothe and discussed the temporary job openings that had been created and asked if Lamothe was interested. He also discussed Lamothe's availability to fill such a position. When Lamothe said he was interested, Lyon set up an interview for him with the two supervisors, Hilton and Hebert. Lyon denied meeting with or speaking to Lamothe when he came in for this interview. Lyon testified that the supervisors reported to him that Lamothe was qualified for the job. He recalled that they also had discussed Lamothe's class schedule in relation to the job. Lyon then called Lamothe, sometime during the week of October 11 and offered him the position. Lyon testified that he explained to Lamothe that the job was the temporary position on second shift that he had interviewed for and that it would last 4–6 weeks. He recalled that Lamothe accepted the job, saying that it would not interfere with his class schedule since he had all day classes. Lyon gave Lamothe an October 18 reporting date and told him to come in early to meet with St. Jean to fill out paperwork. According to Lyon, the first time he actually met Lamothe was when he reported to work on October 18.

In addition to denying generally that he met with Lamothe on September 1, Lyon also specifically denied telling Lamothe that the Respondent did not have any permanent openings. According to Lyon, the Respondent in fact hired 4–5 people for permanent positions in September. The September 2000 seniority list in evidence shows seven employees with seniority dates between September 9 and October 11, 1999. The seniority list does not indicate what shift or job classification they were hired to fill. However, other documents in the record show that there were two job postings for second shift positions in August and September for which there were no bidders. The "Award of Open Positions" notice indicates that the Respondent would fill these jobs by hiring from the outside. The Award posting does not indicate the labor grade or any other requirements for these particular jobs.

The Respondent put in evidence a copy of Lyon's calendar for August and September to support his testimony that he did not meet with Lamothe on September 1. Although Lyon testified that he notes appointments for interviews on his calendar, and the calendar in fact shows such appointments on September 1 with others, there is no notation regarding an interview with Lamothe, on September 1 or any other date in those months. On cross-examination, Lyon acknowledged that he does not write everything in his calendar. He also acknowledged that many of the entries are written in pencil and can be erased. The calendars in evidence show that Lyon wrote in entries for September 1 on both the August calendar and on the September calendar. The entries are not identical. For example, on the August calendar, in the box after August 31, Lyon wrote in "9-1-99" and the names of three people. He testified he interviewed these people that day. He also wrote "12:30 job eval commit" (sic). He testified that this was a meeting at the Rogers plant to go over job descriptions for an assistant operator job at that plant. Finally, he wrote "2:30 2d step, PMU" a reference to a grievance meeting at the Woodstock plant. There is a line through this entry. The September calendar has only one entry on September 1, i.e., the second step grievance meeting, without any line through it. Lyon did not explain the discrepancy between the two calendars for the same day.

Although Lyon denies that he interviewed Lamothe, his testimony indicates that this would have been a departure from the normal hiring process. According to Lyon, he conducts an initial screening of all applicants and then arranges an interview with a team of two supervisors. Lyon testified further that he does not give out blank applications to prospective employees. He specifically denied giving one to Lamothe. According to Lyon, applications are only given out by the receptionist when there are job openings. The receptionist is also the only individual to collect completed applications because she is responsible for entering applicant data in the Respondent's computer for EEO purposes. It is only after this has been done that he would review an application to determine if they are qualified for the specific openings available at the time. Lyon did not explain how it came to be that Lamothe filled out an application on September 1 and was not interviewed until more than a month later.

Hilton and Hebert testified for the Respondent regarding the interview they conducted of Lamothe. Both recalled that the interview was in late September or early October and that they were interviewing Lamothe for a specific job, i.e., the temporary job for which he was hired. They both denied that there was any discussion of permanent employment during the interview. They also denied seeing Lyon before or after the interview. According to Hilton and Hebert, they escorted Lamothe to the exit to the back parking lot after the interview without stopping at Lyon's office. With regard to the interview itself, they testified that they explained the temporary job to Lamothe and discussed whether he would be able to work overtime while going to school. They testified that Lamothe told them that the overtime would not be a problem because it would not conflict with his class schedule. While their testimony was mutually corroborative, there was no sequestration order in effect and Hebert was able to hear Hilton's testimony. Hebert even prefaced his testimony regarding Lamothe's interview as follows: "Like Mr. Hilton had said, ..." Both witnesses were also present throughout the testimony of Lyon and Richardson.

Hilton testified on cross-examination that he interviewed approximately 50 people during the August–October period and that there was nothing remarkable about Lamothe. Nevertheless, he was able to recall in significant detail this one interview that occurred 1 year earlier. Hebert also testified, initially, that

he had to interview a few candidates for the temporary job and that Lamothe was one of them. Later in his testimony, he said that Lamothe was the only one he interviewed for this temporary job. Both Hilton and Hebert acknowledged that they often will bring an applicant back to Lyon's office after the interview. However, they testified that they were certain that this did not occur with Lamothe. Finally, neither witness was able to recall how or by whom they were informed that they would be interviewing Lamothe on that particular date.

Lyon testified that he learned that Lamothe had bid on a permanent job at the end of his first week of employment when the bid cards were collected. The following Monday morning, October 25, he talked to Richardson about this. According to Lyon, he had some difficulty with Lamothe's bid because it indicated his interest in permanent employment. Lyon testified that he met with Richardson to let him know that he would not be awarding Lamothe the permanent job. He told Richardson that he had only discussed temporary employment with Lamothe when he was hired. Lyon testified that Richardson told him to meet with Lamothe and, if it appeared that he had been dishonest, to terminate him. Lyon explained that Lamothe had indicated to him and Richardson that he was looking for temporary employment. His bid on the permanent job indicated to Lyon that this was not the case.

Richardson did not testify specifically about this meeting with Lyon but did testify that he directed Lyon to meet with Lamothe about his job bid. According to Richardson, he authorized Lyon to terminate Lamothe unless he had a good explanation for submitting the bid. Richardson testified that the reason for this decision was his belief that Lamothe had misled the Respondent when he was hired for the temporary position. Richardson's belief was based on what Lamothe told him during the conversation they had when Lamothe came to the Rogers plant looking for Lyon in late September. Richardson also relied on what Lyon had reported was said in his conversations with Lamothe before he was hired.

As directed, Lyon met with Lamothe on Monday afternoon, October 25. According to Lyon, he opened the meeting by telling Lamothe that he wanted to speak to him because he had learned that Lamothe bid on a permanent job at the other plant whereas he had been hired for the temporary job at the Rogers plant. Lyon testified that Lamothe responded that he really wanted a permanent job. Lyon asked if Lamothe had told his supervisor this. Lamothe said, no. Lyon told Lamothe that he had not been forthcoming, that he had been hired and trained for a specific temporary position and now, he was saying he was not interested in that job. Lamothe told Lyon that his plan all along was to take the temporary job, join the Union and take the first permanent job that came along. According to Lyon, he then told Lamothe that he had misled the company and that he had to be terminated. Lyon denied that Lamothe offered to withdraw the bid in order to keep the temporary job.

Lyon testified that the fact that Lamothe was attempting to use the contractual bidding procedure had no bearing on his decision. According to Lyon, he made the decision to terminate Lamothe because Lamothe had misrepresented his interest in the temporary job during the hiring process. Lyon testified that the Respondent would terminate any employee who misrepresented things during the hiring process. The Respondent's application does contain form language indicating that "employment and continuation of employment by [Respondent] is predicated upon the truthfulness of the information supplied" in the application. Nowhere on Lamothe's application did he indicate that he was seeking only temporary employment. On the contrary, the application in evidence shows that Lamothe checked "permanent," not "temporary" for "type of employment desired." Lyon admitted that he reviewed Lamothe's application before calling him about the temporary job and that he took note of this fact.

Richardson testified similarly that he authorized Lyon to terminate Lamothe, pending the outcome of Lyon's meeting with Lamothe, not because Lamothe had utilized the contractual bidding procedure but because of what that action represented. As noted above, Richardson believed that Lamothe misrepresented himself when he expressed interest in and accepted the temporary job offered by the Respondent. At the hearing, Richardson characterized this as misconduct. Richardson conceded that Lamothe never told him that he was only interested in temporary employment. Richardson did not see Lamothe's application, on which he had checked "permanent employment," until shortly before the hearing. Richardson also conceded that he was not present when Lyon spoke to Lamothe before he was hired and does not know what Lamothe said at that time.

Lyon and Richardson were both present at Lamothe's third step grievance meeting. Richardson agreed with the General Counsel's witnesses that Rivers told the Respondent that Lamothe had offered to withdraw his bid in order to keep the temporary job. Lyon testified that he did not recall this being said. Both Lyon and Richardson testified, however, that they would still have terminated Lamothe even if he withdrew his bid. This contradicts a statement contained in a position letter submitted by the Respondent's counsel during the investigation of the charge. In that letter, counsel stated that "Lyon indicates that if Lamothe had stated his interest in remaining in the temporary job, Rogers would not have terminated him since the entire purpose for hiring Lamothe in the first place had been to fill this temporary position." Lyon testified that this statement was not accurate, although he admitted being consulted by counsel before the letter was sent. Lyon also conceded that he received a copy of the letter after it was sent and reviewed it but never pointed out this "inaccuracy."[5]

At the hearing, Richardson claimed for the first time that the Respondent has a policy of not hiring college students for permanent positions. According to Richardson, the reason for this policy is that full-time, permanent employees must be able to work any job on any shift and overtime when required. A college student would not be able to fulfill this requirement because of conflicts with classes and might ultimately have to quit when faced with a choice of working or going to school. The Respondent offered no documentary evidence to support

[5] The Board has long held that such position letters are admissible as evidence in unfair labor practice proceedings. The *Bond Press, Inc.*, 254 NLRB 1227 fn. 19 (1981); *Steve Aloi Ford, Inc.*, 179 NLRB 229 fn. 2 (1969).

Richardson's testimony that such a policy exists or has been relied upon in the past to deny employment to a college student. There is no dispute that no one ever told Lamothe that the Respondent had such a policy.

The Respondent also contended, at the hearing as well as earlier in its position letters and in its response to Lamothe's claim for unemployment benefits, that Lamothe's "sudden interest" in permanent employment caused the Respondent to waste time and expense in training him for the temporary job for which he was hired. At the hearing, the Respondent's witnesses testified that Lamothe had completed 1 week of training at the time of termination. He was expected to complete the training within the following week. The Respondent made a decision in the same week he was terminated not to replace Lamothe with another temporary employee.[6] Instead, the Respondent used other employees working overtime to meet the additional production needs that the temporary job had been created to address. Briquier, Lamothe's supervisor on the temporary job, testified that the Respondent actually spent more money by doing this than it would have if it retained Lamothe.

The record reveals that there was one other bid submitted for the job that Lamothe bid on. The employee who submitted the other bid, a permanent employee named Leo, withdrew his bid at about the same time that the job was to be offered to him. Lamothe remained as the only bidder for the job. Because the Respondent decided not to award the job to Lamothe, it had to hire someone from the outside. Lyon testified that he hired Craig Fiske to fill the second shift rewind job that Lamothe sought. Fiske was hired December 1 and bid on another job within his first month on the job.

The parties disagree whether the collective-bargaining agreement gives temporary employees the right to bid on permanent jobs. The General Counsel contends, based on Rivers' testimony, that temporary employees have the same rights as probationary employees to bid on permanent jobs. Richardson and Lyon both testified that the Respondent has never allowed a temporary employee to bid on a permanent job. The Respondent cites the language in the agreement for the summer employee program, that summer employees are not eligible for continuing employment beyond the summer program, as supporting this interpretation of the contract.

The bidding procedure at issue is contained in the seniority clause of the collective-bargaining agreement. Article 10, section 10-2 provides that "seniority rights, dating from the date of employment, shall be acquired after the employee has actually worked 90 days." During the first 90 days, a new employee is probationary and may be terminated by the Respondent. Section 10-4 describes the procedure for filling vacancies, promotions, and determining layoffs. The contract provides that the Respondent shall take into consideration seniority and ability in filling vacancies, but where factors constituting ability are equal, seniority governs. There is no dispute that, in filling production jobs, as opposed to maintenance jobs, seniority is the deciding factor because all employees are deemed capable of learning any production job in the plant. Section 10-4 sets forth the following order of preference for filling open positions:

1. 90-day displacement rights.
2. Promotion from within lines if they exist.
3. Job posting on the bulletin boards.
4. Assignment by seniority and preference of unassigned employees to permanent positions.
5. Assignment by seniority and preference of unassigned employees to temporary openings with the exception of those caused by vacation or temporary crew increases.
6. Recall of laid-off employees.
7. Hire.

The same provision defines "unassigned persons" for purposes of the above provisions as follows:

> Unassigned person . . . shall mean a person who is not the official incumbent of a permanent job because his/her seniority (ability) is not sufficient to entitle him/her to any one of the current assigned jobs established by the Company. Ability as used in the preceding sentence shall mean physical ability; and in cases where the open job to which the employee may be assigned is at journeyman level, ability shall also include skill.

Section 10-4 limits the number of times in a year that an employee may successfully bid and describes the procedure for posting of jobs and submission of bids. Under section 10-4 (10), the Respondent must use this procedure to fill all jobs that are not filled by 90-day rights or promotion except for "temporary openings" that are caused by illness or accident or that will last no more than 60 days.[7]

It is undisputed that, while the contract does not define "temporary employees," such employees are included in the bargaining unit and required to comply with the union security provision. Employees hired under the summer employee program are considered temporary employees. The contractual bidding procedure described above does not specifically define who may bid on a job posting. As previously noted, the job postings themselves encourage "all employees" to bid on open positions.

The undisputed evidence in the record shows that the Respondent has accepted bids from employees who were still in their 90-day probationary period and has awarded job openings to such individuals if no one with an earlier hire date submits a bid. The documents placed in evidence by the General Counsel reveal that some new employees have successfully bid on jobs within their first week of employment. While acknowledging this evidence, the Respondent's witnesses contended that probationary employees have no "right" under the contract to bid

[6] The Respondent hired one other temporary employee at the same time as Lamothe to run the machine that Lamothe was running. That employee failed to show up for work on October 25, the same day that the Respondent terminated Lamothe. He was also terminated. Respondent had no temporary employees to run this job after October 25.

[7] The contract does require postings of temporary openings caused by illness or accident where a doctor determines that the absent employee will not return within 45 days. When temporary openings are posted, the contract defines how those openings are to be filled.

on jobs. According to Richardson, the Respondent has permitted such bidding and awarded jobs to probationary employees when no other nonprobationary employee has submitted a bid. Richardson testified that the Respondent allows probationary employs to bid on jobs even during their training period, because it is in the Respondent's interest that new employees find a position they like as soon as possible so that they will remain in the Respondent's employ for the long term. A temporary employee, like the summer students and Lamothe, is different because such employees are hired to fill a specific need with no expectation that they will remain after the 60-day period is done.

Lyon and Richardson testified that they were not aware of any temporary employee submitting a bid for a permanent job before Lamothe did. Although the union president, Rivers, testified that temporary employees have the same right that a probationary employee has to bid on a job, he was able to recall only one temporary employee ever having done so. Rivers testified that his son, John Rivers, started as a summer employee while going to school. He continued as a permanent employee and has worked for the Respondent ever since. The seniority list in evidence shows that his hire date is July 22, 1991. This testimony is uncontradicted.

B. Factual Findings

The above recitation of the evidence reveals several significant factual disputes requiring a credibility resolution. The first is whether Lamothe met with Lyon on or about September 1 regarding his interest in a permanent job. As previously noted, Lyon insists he never interviewed Lamothe. I find that Lamothe's recollection of events is more plausible than that of Lyon. Although Lamothe had difficulty recalling some dates and details of events, he generally impressed me as a more truthful witness. In addition, Lamothe's testimony makes more sense in the context of other evidence in the record. There is no dispute that Rivers spoke to Richardson in late August or early September after Lamothe asked for his help in getting a job. It is more than likely that it was as a result of this conversation that Lamothe filled out the application on September 1. Moreover, based on his description of the hiring process, it is more probable than not that Lyon would have interviewed Lamothe around the time that he filled out his application, particularly if, as Lyon claims, there were in fact job openings at the time. In addition, Richardson's encounter with Lamothe later in September only makes sense if Lamothe had previously met with Lyon. As Richardson testified, he found Lamothe in the hallway by Lyon's office. When he questioned Lamothe about his presence there, Lamothe indicated he was looking for Lyon about a job. Why would Lamothe have gone to the plant in search of Lyon if he had never met the man or spoken to him about a job? It makes more sense that Lamothe was at the plant that day, looking for Lyon, because Lyon told him to check back with him from time-to-time.

In crediting Lamothe over Lyon, I have also considered the fact that the two supervisors, Hilton and Hebert, seem to corroborate Lyon regarding the timing of the interview and Lyon's lack of contact with Lamothe. However, as noted previously, this testimony was only elicited after Hilton and Hebert had heard Lyon's version of events and after Hebert had been influenced by Hilton's testimony regarding the interview. The detailed recollection of how they encountered Lamothe, what they talked about and what happened at the end of the interview is suspect in light of Hilton's admission that he had conducted 50 interviews around that time and that there was nothing about Lamothe that stood out. I also note that their apparently clear recollection of those facts that supported the Respondent's case was in contrast to their total lack of recall regarding neutral details such as how they got the assignment to interview Lamothe in the first place. Accordingly, I credit Lamothe's testimony that his interview with Hilton and Hebert occurred on or about September 1 after he first met with Lyon.

Having found that Lamothe in fact met with Lyon on or about September 1 regarding his job application, I also credit him regarding what was said at that meeting. Specifically, I find that Lamothe told Lyon that he was seeking permanent employment, just as he had indicated on the application. In response to Lyon's inquiry whether Lamothe would accept a temporary position if no permanent positions were available, Lamothe sought assurance that doing so would not jeopardize his chances for permanent employment. Lyon assured him that he would have the same rights as other employees to bid on jobs, even though he would be a temporary employee. Lamothe's testimony that Lyon told him there were no openings at the time appears to conflict with documentary evidence showing there were at least two openings on second shift in early September and that several new employees were hired around that time. I do not find this fatal to Lamothe's credibility as the record contains no information regarding these openings and whether Lamothe would have qualified for them. Nor does the record identify what jobs people were hired to fill in September and early October. In addition, Lyon testified that it usually takes at least 3 weeks from his initial screening interview of an applicant to the date of hire. Therefore, the process of hiring those individuals who started work in September may have already begun by the time Lyon met with Lamothe. Thus, Lyon's statement during the interview that there were no job openings may have been accurate because at that time there were no specific jobs for which Lamothe qualified.

Lyon and Lamothe also disagree about what was said during his discharge interview on October 25. Lyon denies that Lamothe offered to withdraw his bid in order to retain his temporary job. I do not find this denial credible. As previously noted, Lyon's denial that Lamothe offered to withdraw his bid is contradicted by Richardson, who recalled Rivers referring to such an offer at the third step grievance meeting. In addition, the testimony of Lyon and Richardson that the Respondent would have terminated Lamothe even if he had withdrawn the bid is contradicted by the position letter submitted by the Respondent's attorney during the investigation. The attorney stated that Lyon said that the Respondent would not have terminated Lamothe if he withdrew the bid. Lyon admitted being consulted by the attorney before the position letter was submitted. Thus, Lyon was compelled to deny at the hearing that such an offer was made even though his denial was contradicted by Richardson. In discrediting Lyon, I also note the testimony of

Rivers that Lyon had a reputation for untruthfulness in his dealings with the Union.[8]

The undisputed and credited evidence in the record establishes that Lamothe sought permanent employment with the Respondent after his summer job ended by enlisting the aid of Union President Rivers, that Rivers spoke to Richardson on his behalf and that, as a result of these communications, Lyon invited Lamothe to come in and fill out an application. The credible evidence establishes further that, on September 1, Lamothe met with Lyon, filled out an application indicating his desire for permanent rather than temporary employment, and was interviewed by Lyon and two of the Respondent's supervisors. During his interview with Lyon, Lamothe was asked if he would accept temporary employment if no permanent openings were available. I have found that, in response, Lamothe told Lyon that he would accept such an offer only if accepting temporary employment would not jeopardize his chance for a permanent job. Lyon assured him that he would have the same right to bid on openings as any other employee.

The undisputed evidence also shows that Lamothe had a conversation with Richardson toward the end of September in which Richardson acknowledged that he was aware of Lamothe's interest in employment and told Lamothe that there might be some temporary openings in the near future. Although Lamothe expressed interest in such a position, he did not disavow the interest in permanent employment expressed in his employment application. On or about October 14, when Lyon called to offer a temporary position to Lamothe, he reviewed Lamothe's application and was aware that Lamothe had expressed interest in permanent employment. There is no dispute that, in accepting the temporary position, Lamothe did not tell Lyon that he was no longer interested in permanent employment.

There is no dispute that Lamothe submitted a bid on a permanent position during his first week of employment and that the Respondent terminated him immediately upon becoming aware that he had submitted the bid. The Respondent admits that it rejected Lamothe's bid even though he was the only bidder for the job. At the time he was terminated, Lamothe was told that he was being terminated because he had submitted a bid for a permanent job when he had been hired for a temporary position. Lyon told Lamothe that the Respondent believed he had misled the Respondent when he accepted the temporary job. Lamothe denied this, reminding Lyon that he had told him about his interest in permanent employment at his first interview. I have already found that Lamothe offered to withdraw his bid and remain on the temporary job, but Lyon declined this offer.

In response to a grievance filed by the Union on Lamothe's behalf, Richardson told the Union that it had fired Lamothe because he had expressed interest in a permanent position. The Respondent denied the grievance at the third and fourth steps solely on the ground that Lamothe's termination was not grievable because he was a probationary employee. In response to his claim for unemployment benefits, the Respondent claimed that it terminated Lamothe because he indicated that he no longer wanted the temporary job for which he was hired and that this caused the Respondent to waste time and money training him for this job. The Respondent took the same position in its initial response to the unfair labor practice charge, i.e., that his bid on a permanent job was contrary to the interest in temporary employment he had expressed when hired. In response to the charge, the Respondent also took the position that it would not have terminated Lamothe had he expressed interest in remaining on his temporary job. At the hearing, Richardson and Lyon contradicted their attorney by testifying that they would have terminated Lamothe even if he offered to withdraw his bid because he had been dishonest during the hiring process. Also at the hearing, Lyon and Richardson for the first time characterized Lamothe's actions as "misconduct" and Richardson added, as a further ground for his decision to terminate Lamothe, that the Respondent has a policy of not hiring college students for permanent jobs.

C. Legal Analysis

The Supreme Court in *City Disposal Systems*, supra, approved of the Board's interpretation of Section 7 of the Act as including, within the definition of "concerted activity," an individual employee's "reasonable and honest invocation of a right provided for in his collective-bargaining agreement." Such activity falls within the "mutual aid and protection" clause even if the individual employee has his own interests most immediately in mind. 465 U.S. at 830. The Court agreed with the Board that the employee did not have to make an explicit reference to the collective-bargaining agreement when invoking his rights as long as it was reasonably clear that the right asserted was one encompassed by the agreement. Id. at 839–840. The Court also agreed with the Board that an employee's invocation of a perceived contractual right was protected regardless of whether the employee turned out to have been correct in his belief as to his rights. Id. at 840. See also *Interboro Contractors*, supra. Accord: *Union Carbide Corp.*, 331 NLRB 356 (2000). In a case remarkably similar to the instant case, the Board held that a probationary employee was engaged in protected concerted activity under the *Interboro* doctrine when he bid on a job opening and later refused to withdraw his bid even though the contract did not clearly give him the right to bid. *Anaconda Aluminum Co.*, 160 NLRB 35, 40–41 (1966).

I find that Lamothe's conduct in submitting a bid for the permanent opening at the Woodstock plant was protected concerted activity under Section 7 of the Act. Although the collective-bargaining agreement does not explicitly give employees in temporary jobs the right to bid, it does not expressly prohibit such bids. In fact, the contract is silent as to the rights of temporary employees who, it is undisputed, are part of the bargaining unit. The fact that the parties specifically provided in their agreement for the summer employee program that summer employees could not bid on permanent jobs does not establish that temporary employees who were not working under the summer program were likewise restricted. If this were the case, there would have been no need to write a separate agreement for the summer program. In any event, the issue is not whether Lamothe in fact had the right to submit his job bid but whether,

[8] Such testimony is admissible and may be weighed in evaluating credibility under Rule 608 (a) of the Federal Rules of Evidence.

in doing so, he "reasonably and honestly" believed he was exercising a right under the contract. In light of what he had been told by the Union's president and by Lyon when he first sought permanent employment and in light of the other evidence in the record showing that probationary employees routinely bid on jobs soon after being hired, I find that he was acting reasonably and honestly in seeking a permanent position under the contractual job posting procedures.

The Respondent argues that Lamothe was not terminated because he submitted a job bid under the collective-bargaining agreement, but because his action in doing so was dishonest because he misled the Respondent regarding his interest in temporary employment. I do not agree. From his first contact with the Respondent on September 1, Lamothe expressly stated his interest in a permanent job. At no time did he tell Lyon or Richardson that he had changed his mind. The fact that he accepted a temporary job because no permanent job was offered was not "dishonest." Lyon and Richardson need only have looked at his application to learn of Lamothe's interest in permanent employment. If anyone was "misled" it was Lamothe. Lyon told him on September 1 that he would not be precluded from bidding on a permanent job if he accepted temporary employment only to fire him when he did so.

The Board has recently held that where the conduct for which an employee is discharged is intertwined with protected concerted activity, the Board's *Wright Line*[9] analysis does not apply. *Felix Industries*, 331 NLRB 144, 146 (2000); *Nor-Cal Beverage Co.*, 330 NLRB 610, 611–612 (2000). Here, the Respondent's claim that Lamothe misled the Respondent is inextricably intertwined with his invocation of a perceived right under the contract to bid on a job posting. It was the job bid that triggered the discharge. Thus, the Respondent cannot show that it would have fired Lamothe even if he did not submit the job bid because it was the bid that precipitated the Respondent's action. Although Richardson also asserted at the hearing that the Respondent has a policy of not hiring college students for permanent jobs, such a policy, assuming it exists, would not require the discharge of a temporary employee who expressed interest in permanent employment. In any event, the Respondent never advanced this reason before the hearing and never told Lamothe that such a policy existed. Based on the above, I find that the Respondent discharged Lamothe in violation of Section 8(a)(1) of the Act because he invoked a right he reasonably and honestly believed he had under the Respondent's collective-bargaining agreement with the Union. *Anaconda Aluminum Co.*, supra.

The complaint also alleges that the Respondent's refusal to grant, or consider granting, Lamothe the permanent position he bid on was unlawful. This is a more difficult issue. Although the record is replete with evidence of probationary employees being awarded jobs through the bidding procedure when no nonprobationary employee has submitted a bid and Lamothe was characterized as both a probationary and temporary employee, there is scant evidence of an employee in a temporary job being awarded a job under similar circumstances. The contract is silent on this issue. The only evidence of a temporary employee getting a permanent job is Rivers' undisputed testimony that his son started as a temporary summer employee in 1991, and has worked continuously for the Respondent ever since. It must be determined whether the Respondent's rejection of Lamothe's bid was because he asserted a right under the contract to bid on the job or because the Respondent reasonably believed that he was not eligible for the job because of his status as a temporary employee. If it is the latter, then the Respondent's rejection of Lamothe's bid would be lawful even though its decision to terminate him was not.[10]

The collective-bargaining agreement does provide some assistance in resolving this question. Under article 10, section 10-4, setting forth the order of preference for filling open positions, "assignment by seniority and preference of unassigned employees to permanent positions" is listed fourth, after job posting on bulletin boards. The contractual definition of "unassigned employees" would appear to include someone in a temporary position like Lamothe. In fact, the form filled out by St. Jean when Lamothe started working on October 18 identifies his job title as "unassigned." Moreover, because the Respondent rejected Lamothe's bid, the award notice posted on the bulletin board indicated that the Respondent would fill this position by hiring from the outside, which it did. The Respondent has indicated no reason why it could not have "hired" Lamothe for this position after his temporary job was completed. After all, he did submit an application for permanent employment. The individual hired by the Respondent to fill the permanent position that Lamothe sought did not start until December 1. Lamothe's temporary job, which started on October 18, was only expected to last 4–6 weeks and would have ended around the same time. In light of these facts, I conclude that the Respondent rejected Lamothe's bid and refused to consider him for the permanent second shift rewind operator job at the Woodstock plant because he had attempted to invoke a perceived right under the contract. Accordingly, I find that the General Counsel has met his burden as to this allegation as well.

CONCLUSIONS OF LAW

By refusing to grant, or consider granting, a permanent position to Jeremiah Lamothe and by terminating him on October 25, 1999 because he reasonably and honestly invoked a right under the Respondent's collective-bargaining agreement with the Union, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

[9] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[10] The Respondent did not have to terminate Lamothe even if it reasonably believed he had no right to bid on a permanent job. To act lawfully, the Respondent merely had to reject the bid and tell Lamothe that he was not eligible. Lamothe would have remained in the temporary job and no unfair labor practice could be found. Lamothe even offered to withdraw his bid. The Respondent's rejection of this offer is further evidence of the true motive behind its decision to terminate him.

desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having unlawfully discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Because the Respondent unlawfully refused to grant, or consider granting, Lamothe a permanent position, I shall recommend that it offer such a position to Lamothe and make him whole for any wages and benefits he lost as a result of not being awarded the second shift rewind operator position for which he submitted a bid.

In addition to backpay, the General Counsel seeks an award of interest compounded on a daily basis in lieu of the simple interest normally awarded with backpay under *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The General Counsel argues that an assessment of simple interest rather than compounded interest rewards tardy compliance with Board orders and undercompensates the victims of unfair labor practices for their monetary losses. The General Counsel notes further that the Internal Revenue Service, whose interest rate the Board applies to its backpay awards, compounds interest on underpayment and overpayment of taxes. According to the General Counsel, compounding interest on Board backpay awards would be consistent with the practice in the Federal courts and other administrative agencies dealing with employment litigation. Having considered the arguments made by the General Counsel and noting the Board has in the past indicated an interest in modifying its procedures for calculating interest on backpay awards,[11] I shall recommend that the Board award interest compounded on a daily basis in this case. Such an award is fair, consistent with Federal practice, and advances the Board's policy of making individuals truly whole for any monetary loss they suffered as a result of a respondent's unfair labor practices.

The General Counsel also seeks to modify the Board's customary order requiring a Respondent to preserve and make available to the Board, all payroll and other records necessary to calculate backpay by requiring that the Respondent produce such records at any office designated by the Board. The General Counsel also seeks to include electronic copies of such records where they are available. The General Counsel argues generally that imposing this additional requirement is necessary because of problems that sometimes arise in obtaining voluntary compliance with the Board's standard provision. In the absence of any empirical evidence as to the extent of noncompliance with the Board's standard language and in the absence of any evidence that the Respondent is likely to attempt to avoid its obligations to assist the Board in the calculation of backpay, I am reluctant to impose any new requirements. The change sought by the General Counsel would seem more appropriately accomplished through the Board's rulemaking procedures.

[11] *Alaska Pulp Corp.*, 300 NLRB 232 fn. 4 (1990).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Rogers Corporation, Rogers, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to grant, or consider granting, job openings to, discharging, or otherwise taking adverse action against any employee for reasonably and honestly invoking any right they have under the collective-bargaining agreement with Oak Lodge-Rogers Local No. 46 and United Paperworkers International Union, AFL–CIO.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jeremiah Lamothe full reinstatement to his former job or, if that job no longer exists, to a permanent position substantially equivalent to the second shift job he sought through the contractual bidding procedure in October 1999, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Lamothe whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in Rogers and Woodstock, Connecticut copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed either of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 25, 1999.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 26, 2001

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to grant, or consider granting, job openings, discharge or otherwise take adverse action against any of you for reasonably and honestly invoking any rights you have under our collective-bargaining agreement with Oak Lodge-Rogers Local No. 46 and United Paperworkers International Union, AFL–CIO.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jeremiah Lamothe full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent permanent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Lamothe whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to Lamothe's unlawful discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ROGERS CORPORATION